IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

IN RE)			
)			
GERALD PATRICK RUETH and)	Case No.	99-00325
CHALYSE RUETH, dba Rueth Farms,)		
)			
)			
	Debtors.)	ME	EMORANDUM OF	
DECISION					
)	and	ORDER	
)			

HONORABLE TERRY L. MYERS, U.S. BANKRUPTCY JUDGE

Richard D. Himberger, Boise, Idaho, for Debtors.

Kimbell D. Gourley, EBERLE, BERLIN, KADING, TURNBOW & McKLVEEN, Boise, Idaho, for KeyBank National Association.

Julie K. Fischer, WHITE, PETERSON, PRUSS, MORROW & GIGRAY, Nampa, Idaho, for Landview Fertilizer, Inc.

Leslie M. Bock, DILLON, BOSCH, DAW & BOCK, Boise, Idaho, for John Deere Company.

Bryan K. Walker, ROBINSON & WALKER, Caldwell, Idaho, for Green Thumb Seed Company.

MEMORANDUM OF DECISION and ORDER - 1

Sheila R. Schwager, HAWLEY, TROXELL, ENNIS & HAWLEY, Boise, Idaho, for Case Credit Corporation.

Gery W. Edson, Boise, Idaho, for David Walker.

Jeffrey G. Howe, Assistant U.S. Trustee, Boise, Idaho, for the U.S. Trustee.

David E. Kerrick, Caldwell, Idaho, for Jose Luis Delgadillo, Jr. and Stephanie Lee Delgadillo.

Jeffrey M. Wilson, WILSON & McColl, Boise, Idaho, for Dallas Hess, Inc.

Ronald Schoen, Payette, Idaho, Trustee.

Two secured creditors, KeyBank National Association ("KeyBank") and Landview Fertilizer, Inc. ("Landview"), each claim consensual security interests in the above chapter 12 Debtors' 1998 crop proceeds. The resolution of this dispute is prerequisite to confirmation of the Debtors' proposed 12 plan; both issues were taken under advisement following hearing on May 7, 1999, and the lien issue was fully submitted on May 19.

KeyBank and Landview have agreed to the submission of their dispute upon motion, written argument and, for the most part, stipulated facts. They have waived the need for an adversary proceeding, Rule 7001(2),¹ with its procedural requirements and consequent delay.² All parties, including these two creditors, have urged the Court that time is of the essence in resolving the remaining issues in this case.

¹ Unless otherwise indicated, all references to "code," "title," "chapter," and "section" are to the Bankruptcy Code, 11 U.S.C. §§ 101 - 1330, and all references to "rule" are to the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.") 1001 - 9036.

² The Court compliments counsel for Landview and KeyBank for their handling of this matter. They have shown a thoughtful and considered approach to the entire case and the rights and needs of all parties, while at the same time thoroughly advocating the interests of their own clients. The Court further appreciates their stipulation as to virtually all critical facts, and the quality and timeliness of their briefing.

The Court has analyzed the submissions and contentions of the parties. This decision constitutes the Court's findings of fact and conclusions of law on the question of the lien priority dispute. Rule 7052, 9014. However, given the need for prompt resolution, this decision has been expedited. Therefore the Court reserves the ability to further elaborate on its reasoning, findings and conclusions by supplemental written decision.

BACKGROUND

The parties' stipulation sets forth virtually all of the facts of consequence to this dispute, and the Court need not repeat the same verbatim. A brief summary will suffice.

KeyBank commenced a lending relationship with the Debtors in May 1994 under written agreement and on a revolving line of credit basis. The obligation was reflected by a "variable rate agricultural revolving or draw note" in a "principal amount/credit limit" of \$225,000.00, bearing a maturity date of May 10, 1999. The loan documents make clear the parties' understanding that funds would be advanced on a revolving basis under the line of credit during the term of the agreement and note, with total advances not to exceed the commitment amount established under each year's operating budget, up to a maximum at any time of \$225,000.00. The Debtors' obligations are secured by a comprehensive or "blanket" Article 9 security interest, which includes a security interest in farm products (crops) and the proceeds thereof. KeyBank filed UCC-1 and UCC-1F financing statements on May 16, 1994 to perfect these interests.

Landview provided chemical and fertilizer to the Debtors in early 1998, for use in Debtors' production of their 1998 crops. This advance of credit is reflected by an (open) account agreement in June 1998, and was perfected by a

UCC-1F financing statement filed June 9, 1998.³ Under the 1998 lending, Debtors owe Landview \$35,232.36.

The dispute involves the priority, as between KeyBank and Landview, in a portion of the 1998 crop proceeds. The Debtors' plan presumes that KeyBank is the superior claimant and that Landview occupies the status of an unsecured creditor as to the \$35,232.36 debt. If that is in fact the case, the plan is, by the agreement of all the parties, confirmable.⁴ However, if Landview is found to hold the superior interest, the plan cannot be confirmed absent amendment and additional hearing due to the reserved objections of KeyBank.

³ The parties have stipulated to a 1997 lending relationship between Landview and the Debtors, reflected by a promissory note, security agreement, and UCC-1F financing statement, but that lending is not directly at issue. To the extent Landview argues a superior right under the "new value" provisions of Idaho Code § 28-9-312(2), it must necessarily rely on the 1998 credit. *See* discussion, *infra* (new value given to enable debtor to produce crops must be given not more than 3 months before planting.)

⁴ Confirmation, in this event, still requires submission of an amended plan and an Order, endorsed by numerous parties' counsel, to memorialize certain agreements and modifications reached and announced at the time of hearing on May 7.

DISCUSSION

Lien priority under Article 9

The primary issues are drawn under Idaho Code § 28-9-312 which provides in pertinent part:

28-9-312. Priorities among conflicting security interest in the same collateral. ---

. . .

(2) A perfected security interest in crops for new value given to enable the debtor to produce the crops during the production season and given not more than three (3) months before the crops become growing crops by planting or otherwise takes priority over an earlier perfected security interest to the extent that such earlier interest secures obligations due more than six (6) months before the crops become growing crops by planting or otherwise, even though the person giving new value had knowledge of the earlier security interest.

. . .

- (5) In all cases not governed by other rules stated in this section . . . priority between conflicting security interests in the same collateral shall be determined according to the following rules:
 - (a) conflicting security interests rank according to priority in time of filing or perfection. Priority dates from the time a filing is first made covering the collateral or the time the security interest is first perfected, whichever is earlier, provided there is no period thereafter when there is neither filing nor perfection.
 - (b) so long as conflicting security interests are unperfected, the first to attach has priority.

(6) For the purposes of subsection (5) a date of filing or perfection as to collateral is also a date of filing or perfection as to proceeds.

The statute thus generally creates a "first in time, first in right" priority scheme. Farmers National Bank v. Shirey, 126 Idaho 63, 72, 878 P.2d 762, 771 (1994). See also, 2 White & Summers, Uniform Commercial Code § 26-4, at p. 497-99 (3d ed. 1988). Where both creditors need to file financing statements in order to perfect, the first to so file wins. Id. The statute, however, provides in subsection (2) a limited opportunity for a creditor to trump a prior and superior perfected interest, if the new lender's credit enables the debtor to produce crops and is advanced within certain time and other constraints, and so long as the superior interest has become "due." Idaho Code § 28-9-312(2). See also, White & Summers, at § 26-6, at p. 517. Landview asserts it is entitled to the benefit of that provision.

There is no dispute that Landview has a perfected security interest in 1998 crops by virtue of its June 1998 account agreement and UCC-1F; that Landview gave "new value" to the Debtors; that Landview advanced that new value not more than 3 months prior to Debtors' planting of the 1998 crops; and that Landview's advance enabled the production of the crops. The issue presented concerns the

Idaho Code § 28-9-312(2) element of whether KeyBank's perfected secured obligations were "due" more than 6 months before the crops became growing.

White & Summers states that the scope of UCC § 9-312(2): is carved down almost to insignificance by the last clause in it which provides that the security interest which meets the three tests [of new value, enabling production, and provision within 3

⁵ "Idaho Code § 28-9-312(5)(a) exclusively delimits the priority of competing security interests where the facts clearly establish that the security interests have been properly filed, providing that the first interest properly filed holds a superior claim over all other secured and unsecured creditors as a matter of law." *Id.* at n.1.

⁶ A slightly different analysis attends where one of the creditors is entitled to automatic perfection, or is required to perfect by possession. Such variations are not at issue in this case.

months] enjoys priority only over interests that secure "obligations due more than six months before the crops become growing crops. . . ." That is, subsection (2) entitles one to priority only over obligations more than six months overdue at the time the crops in question become growing crops.

Id. at § 26-6, at p. 517.

Landview argues that, notwithstanding the May 1999⁷ maturity of the Debtors' obligation on KeyBank's line of credit note, the debt for practical purposes became "due" each year under the line, and had to be annually approved by KeyBank based on the Debtors' budget. Landview also notes that KeyBank had the right to declare default and accelerate the debt, and had in fact entered into a "workout" of defaults on the loan prior to the instant bankruptcy filing and certainly before the maturity date. This, Landview asserts, proves that the debt was "due" more than six months prior to Landview's 1998 advance.

The Court disagrees with Landview's' analysis of the KeyBank obligation and its reading of the statute.

As noted in White & Summers, at §26-4, at p. 497, the drafters of the UCC priority rules had a choice between giving a line of credit lender priority from its initial loan and perfection, or priority only from the time of each advance; they chose the former approach and "stated the rules in [section] 9-312(5) with precision." The statute thus recognizes the financial realities of lending on a line of credit basis, and allows the lender to secure itself with priority as to future advances without the need for *seriatim* perfections. White & Summers at §26-4, at p. 499. The first creditor may make subsequent advances without the necessity of checking the filing records each time to ensure there are no intervening filings. The second creditor has no complaint, as it can review the same records, and determine whether or not to advance funds, and what its priority will be if it does so. *Id.*8 The second creditor can

⁷ While that date has now arrived, the issue of priority is framed as of the date of the filing of the petition for relief.

⁸ White & Summers cite to Comment 5 to UCC § 9-312 (Idaho Code § 28-9-312, Official Comment 5): "The justification for the rule lies in the necessity

also, in such a situation, approach the superior creditor and seek subordination of its paramount perfected interest to essential new funds. This is something, KeyBank notes (and the loan "addendum" reflects), that Landview did in 1997.

The evidence does not support the contention that the KeyBank obligation had in fact become "due" in 1997. The maturity of the loan was in 1999, and there is no evidence here that KeyBank accelerated the obligation and declared the debt immediately "due." Rather, the stipulated facts and documents reflect that based on the Debtors' default, their ability to draw on the line had been frozen. The Debtors and KeyBank thereafter entered into an "addendum" to the line of credit agreement reflecting a work-out of the credit.

The Court does not accept Landview's reading of the documents and Article 9 to the effect that the ability to accelerate is the equivalent of the debt having become "due" under Idaho Code § 28-9-312(2). That KeyBank may have had the ability to call the loan and accelerate the debt during the term of the line of credit agreement upon the Debtors' failure to perform does not necessarily mean that the obligation here became "due" in the sense contemplated by Idaho Code

§ 28-9-312(2). If Landview were correct, a line of credit arrangement entitled to priority of perfection from inception, loses the protection of Idaho Code § 28-9-312(5) every time the obligor breaches or defaults on a term of that loan, regardless of how the creditor decides to handle that default. If a default is cured, or the debtor and creditor reach an accommodation, and the debt is never accelerated, has the senior creditor nevertheless lost the benefit of perfection and forced to reperfect, no matter what intervening interests may exist? This is counterintuitive given the structure of the statute and the nature of the credit facility.

of protecting the filing system -- that is, of allowing the secured party who has first filed to make subsequent advances without each time having, as a condition of protection, to check for filings later than his."

⁹ Issues concerning budgets and similar performance requirements arise yearly. Landview's approach to the statute would seriously constrain how lenders could work with their debtors, at the risk of losing their perfected status.

This Court recently considered and applied §28-9-312(2) in *In re TNT Farms*, 226 B.R. 436, 98.4 I.B.C.R. 114, (Bankr.D.Idaho 1998). There, a senior lender (UAP) had a July 15, 1995 perfected security interest in crops securing a promissory note, and also a May 22, 1996 perfected security interest on a one year line of credit relationship with the same debtor. Another creditor (Bio Flora) perfected its interest on May 22, 1997. The promissory note of UAP had matured and that debt was "due and payable" on January 30, 1996, a year before the 1997 crops were planted. *TNT*, 226 B.R. at 439, 445-6 98.4 I.B.C.R. at 114, 118-19. The Court recognized that Bio Flora, as the enabling lender, "trumped" UAP under § 28-9-312(2) as to the overdue promissory note, but not as to the line of credit which came due in January 1997 (within the six month window of that section). While the particular issues raised by Landview here are not expressly discussed in *TNT*, the approach to the statute is consistent with that applied here. 10

The Court therefore finds and concludes on the record presented that, as to the Debtors' 1998 crop proceeds, the perfected security interests of KeyBank are prior in time and right to the perfected security interests of Landview, Idaho Code

 \S 28-9-312(5), and further finds and concludes that Idaho Code \S 28-9-312(2) does not change this result.

Farm labor lien

Landview argues in the alternative that its 1998 UCC-1F filing "substantially complies" with the requirements for obtaining a farm labor lien under Idaho Code § 45-301, et seq., and that such a lien has priority over KeyBank's perfected security interest under Idaho Code § 45-303(2). The Court rejects this contention.

The Court also stated, "Since the obligations under UAP's security interest on the line of credit first became due no more than six months prior to TNT planting its crops, Bio Flora is not protected by the priority provisions of Idaho Code

^{§ 28-9-312(2).&}quot; *TNT*, 226 B.R. at 446 98.4 I.B.C.R. at 119. This appears to indicate that the Court was not of the view that a line of credit facility comes "due" prior to maturity simply because the lender can evaluate the borrower's compliance with all terms and conditions of the loan on an ongoing basis.

A security interest is a consensual lien, *see* § 101(50) and (51), and a farm labor lien is a statutory lien, § 101(53). The assertion of a farm labor lien under the stipulated facts and documents is inconsistent with the security interest language of the account agreement between the Debtors and Landview, and the filing of the UCC-1F financing statement.

Additionally, the Court cannot conclude on the record submitted that the UCC-1F, filed with the Idaho Secretary of State and indexed among like filings perfecting security interests in farm products, is tantamount to filing a "notice of claim of lien" under Idaho Code § 45-307(1) with the Secretary of State. Even if it were, Landview's UCC-1F does not contain all the requisite elements of a notice of claim of lien, including a statement of the nature of the lien claimed (farm laborer's or seed), Idaho Code § 45-308(2)(a), or the amount of the claimed lien, Idaho Code § 45-308(2)(h).¹¹

There is nothing inherent in a UCC-1F filing, or in Landview's actual UCC-1F here, that indicates "farm labor" is involved, rather than some other nonlienable claim. Even assuming that part of Landview's debt can be properly characterized as "farm labor" under Idaho Code § 45-303, no such assertion was ever made of record. Landview's UCC-1F also contains no statement of amount whatsoever. Landview admits this, but argues that the invoices it provided the Debtors set forth the claimed amount and that KeyBank was aware, during the work-out, that Landview would "lend up to \$36,000" to Debtors. But nothing in the statute is premised on KeyBank's actual notice, as opposed to the record notice provided by and under the required filing of a claim of lien. Further, even the documentation provided the Debtors fails to

KeyBank also asserts that Idaho Code § 45-308(2)(g) (the lien claim shall contain "[s]uch information as the Secretary of State shall by administrative rule require") is not satisfied. KeyBank states that the Secretary of State has promulgated forms for use in claiming such liens, and Landview didn't use that form. This may well be true, but the record is incomplete on the point. The Court was not provided with information concerning the promulgated forms or the administrative rules of the State, nor a clear identification of what additional information was required and not provided by Landview. Resolution of this point is unnecessary given the Court's conclusions on the other issues involving this statute.

segregate between product delivered and "labor" supplied. ¹² That Landview might be able to create such an accounting only highlights the fact that no such assertion of a right to a lien or the lienable amount was made in the context of the UCC-1F filing, a filing which Landview now contends "substantially complied" with the lien statute. Notwithstanding the "liberal construction" of the lien statute in favor of unpaid farm laborers, it stretches matters too far to conclude that the act of perfecting a consensual security interest also acts as a filing of a notice of claim of farm labor lien. ¹³

For these several reasons, the Court finds and concludes that Landview has not established, in the alternative to its Idaho Code § 28-9-312(2) contentions, that a bona fide, valid and enforceable farm laborer's lien exists under Idaho law.

Marshaling

Finally, Landview argues that the Court should equitably subordinate KeyBank's security interest to Landview's because KeyBank has additional caches of collateral. For reasons similar to those announced in *TNT*, 226 B.R. at 446, 98.4 I.B.C.R. at 119, the Court declines the invitation to use general theories of equity to alter a result driven by explicit statutory law of the State of Idaho.

CONCLUSION AND ORDER

Based upon the foregoing, the Court finds that the perfected secured interest of KeyBank to 1998 crop proceeds is superior in priority to the claims

Landview submits, Brief at p. 14, n.6, that the invoices it provided the Debtors can be parsed to yield this information. However, the statute contemplates a public filing asserting the claim, and the Debtors' knowledge is not material to whether the UCC-1F substantially meets the requirements of Idaho Code § 45-308(2)(h).

¹³ By virtue of the conclusion that no valid claim of lien was made, the Court need not address the issues involving Landview's failure to commence suit under Idaho Code § 45-310(3) within 6 months of its UCC-1F filing, the alleged tolling of that period under § 108 of the Code, or the alternative to suit of "notice" under § 546(b).

of Landview. Based thereupon and under the agreed record, Landview is unsecured.

The objections to confirmation of Green Thumb Seed Company, John Deere Company, and First Security Bank were resolved as of the May 7 hearing, with the details of the Debtors' agreements with these several creditors to be set forth in an amended plan, prepared by the Debtors with the Trustee's active participation and assistance. The Debtors were also to prepare a proposed order of confirmation for this amended plan, which order was to be endorsed by counsel for all affected creditors and the Trustee. KeyBank's "conditional" and reserved objection has been rendered moot by this decision on the lien priority issue. 14

An objection to confirmation was also filed by Jose and Stephanie Delgadillo. No appearance was made in support of this objection at the time set and noticed for hearing on confirmation. The objection is overruled.¹⁵

Based upon the decision here rendered, the Court will confirm the plan when it has been amended as set forth above and filed and when the endorsed order has been received and reviewed by the Court.

Additionally, the Court will grant the Debtors' motion and approve their lease with Daniel A. Schwalbe, Inc., of certain real property, such lease being contemplated under the Debtors' amended plan, and that issue having been taken under advisement and reserved until the lien priority and confirmation issues were determined.

Dated this 24th day of May, 1999.

¹⁴ The Court is of the understanding that Landview was not asserting any objection to confirmation as an unsecured creditor in the event the Court ruled in favor of KeyBank on the lien priority issue, and the record reflects no such "conditional" objection.

The Delgadillo objection alludes to state court litigation involving the Debtors and these creditors. Such litigation may be in violation of the automatic stay and the jurisdiction of this Court. The Court reserves the right to further address this issue upon pleadings properly filed and noticed by Debtors, the Delgadillos, or the Trustee.